

2013 WL 7389942 (Ill.App. 1 Dist.) (Appellate Brief)
Appellate Court of Illinois, First District.

Estate of: Richard DIMATTEO, Deceased.
Thomas GOLLY, Petitioner,

v.

Clint EASTMAN, individually, and as Independent Executor of the Estate of Richard Dimatteo, Respondent.

No. 12-2948.
February 15, 2013.

Appeal from the Circuit Court of Cook County, Illinois
Probate Division
Case No. 11 P 003915
Honorable Judge John J. Fleming Judge Presiding

Brief of Appellant

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*1 NATURE OF THE CASE

This case involves a challenge to a will alleged to be the result of undue influence and tortious interference with expectancy. Richard DiMatteo died on June 14, 2011, following a sharp decline in his health in the last few months of his life. On April 8, 2011, approximately two months before he died, and at a time when decedent had fallen under the influence of Appellee Clint

Eastman ("Eastman"), a document identified as the decedent's will purported to overturn the decedent's prior will, completely disinheriting decedent's longtime friend, Appellant Thomas Golly ("Golly"), and leaving 100% of decedent's estate to Eastman. In his Verified Amended Petition to Contest and Invalidate Will ("Amended Petition"), Golly set forth causes of action for undue influence and tortious interference with testamentary expectancy, supported by extensive allegations of fact. The Amended Petition alleged (1) that Eastman knew of the will in favor of Golly; (2) that a witness heard Eastman inquire about how to "change" a will shortly before decedent's will was changed to leave 100% to Eastman; (3) that Eastman sought to and did insinuate himself into a position of trust over the decedent, giving rise to a fiduciary duty, and (4) that Eastman actively undermined the relationship between decedent and Golly by, among other things, disparaging Golly and his character to decedent. The Amended Petition further alleged that Eastman undertook all these actions with the intention of influencing the decedent to disinherit Golly and to benefit Eastman. As further alleged in the Amended Petition, after the will was changed, Eastman was heard bragging that he had succeeded in persuading decedent to leave his entire estate to Eastman. On September 17, 2012, the Probate Court dismissed the Amended Petition with prejudice pursuant to §2-615 of the Code of Civil Procedure for failure to state a claim.

***2 ISSUES PRESENTED FOR APPEAL**

1. Whether the trial court erred in granting with prejudice Eastman's motion to dismiss the Amended Petition pursuant to §2-615.
2. Whether the trial court erred in ruling that the Amended Petition failed to state a cause of action for undue influence.
3. Whether the trial court erred in ruling that the Amended Petition failed to state a cause of action for tortious interference with expectancy.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Illinois Supreme Court 304(b)(1). The Probate Court dismissed the Amended Petition with prejudice on September 17, 2012. The order of dismissal specifically states that the order is appealable under Rule 304(b). Golly timely filed his Notice of Appeal on October 12, 2012.

STATEMENT OF FACTS

The Amended Petition sets forth the following allegations of fact, all of which must be accepted as true in the context of a motion to dismiss:

The Decedent

Richard DiMatteo died on June 14, 2011, a resident of Cook County, Illinois, following a precipitous decline in his health in the last few months of his life (R.C257; A3). He lived alone in an apartment in Riverside, Illinois. (R.C257; A3). In the early 2000's, the decedent bought farmland near Winnebago, in Faribault County, Minnesota, adjacent to Golly's family farm. The decedent never married, had no children and was not close to his extended family (R.C257; A3).

***3 The Defendant**

Eastman resides in Winnebago, Minnesota. (R.C257;A3). Eastman is not related to the decedent by blood or marriage. (R.C257;A3). Eastman was, at most, a passing acquaintance of the decedent prior to the sharp decline in decedent's health in the last few months of decedent's life, which coincided with Eastman's campaign to influence decedent to "change" his will (C257;A3). The 2011 Will names Eastman as executor of the decedent's estate. (C257;A3).

The Decedent's Close Personal Relationship With Golly

From the time that decedent bought his farm property in Minnesota, Golly rented it from decedent. (C257;A3). Over the years, decedent became close friends with Golly and his family. (C257;A3). On multiple occasions, decedent spent summers in Minnesota and would stay rent-free in a house owned or rented by Golly (C257;A3). Decedent was suspicious of others and paranoid (or exhibited paranoid characteristics) and did not develop trust or friendships quickly (C257;A3). Nonetheless, over the course of years, decedent became close to Golly and his family, and in many ways was treated as a member of the family. (C257;A3). Decedent would often stay with the Golly family, sometimes for weeks, when he made his visits to Minnesota (C257-258; A3-4). Decedent also regularly asked Golly and his family, including Golly's son, Todd Golly, for assistance with various projects and needs (C258;A4). For example, Golly would travel from Minnesota to Illinois at decedent's request to assist decedent with his medical needs, including visits to the hospital and to medical treaters for examinations and treatment. (C258;A4). Decedent regularly looked to and relied upon Golly and his family for the type of help and support that others generally seek from close family members. (C258;A4) In addition to the close friendship *4 that developed over the years between decedent and Golly, and between decedent and Todd Golly, decedent also developed a particular affection for Todd Golly's son, Thomas Macintosh Golly, who the decedent referred to as "Little Thomas." (C258;A4) Decedent would frequently play with Thomas and give him gifts (C258;A4).

In approximately April 2010, decedent suffered a stroke. At that time, decedent contacted Golly and asked for his help, as he had done many times in the past, requesting that Golly come from Minnesota to Central DuPage Hospital, in Winfield, Illinois, where decedent was hospitalized. Golly did so and provided decedent with any assistance he asked for or needed, including helping decedent get re-situated in his apartment after he was discharged from the hospital (C258;A4).

Decedent's Testamentary Intent

At various times during their interactions, decedent informed Golly of his intention to include Golly in his will because of their long and close friendship, because of the kindness and assistance Golly and his family had provided to him over the years and because, decedent said, he was not close to his own family. (C258;A4) On April 26, 2010, decedent executed a will ("the 2010 Will") (C258;A4). Golly had no involvement in the preparation of this will and he did not urge or otherwise suggest to decedent that he include Golly (or any of Golly's family) in his estate plan (C258-259;A4-5). The 2010 Will named Golly as executor and also identified Golly as the sole beneficiary under the will or, in the event Golly did not survive decedent, then the residue of the estate would pass to Thomas Macintosh Golly (C259;A5). Concurrent to executing the 2010 Will, decedent appointed Golly as his agent under a power of attorney for healthcare decision-making. (C259;A5) At some point thereafter, decedent gave Golly a copy of the 2010 Will and the executed *5 power of attorney document and told Golly he had named him in these documents because Golly had long been his close friend and because of his closeness with Golly's family, who had done so much for him over the years (C259;A5).

Decedent's Decline in Physical, Mental, and Emotional Health

Decedent's physical health declined following his [stroke](#) in April 2010 and sharply declined in the last few months of his life, from March until his death on June 14, 2011.(C259;A5). Decedent had additional [strokes](#) in 2010 and 2011 which further physically weakened him. (C259;A5) Decedent also suffered from [leukemia](#) which continued to worsen and was in its end stages in March 2011. (C259;A5) All of these conditions made decedent increasingly dependent on others and vulnerable to the influence of others, including Eastman.(C259;A5) During this period, decedent's emotional and mental condition and stability declined along with his physical condition (C259;A5).

Decedent's March, 2011 Move to Minnesota and Eastman's Insinuation Into Decedent's Life

In March 2011, decedent bought a house in Blue Earth, Minnesota, near Winnebago.(C259;A5). Thereafter, decedent called Golly and asked for his help in moving from his Riverside, Illinois, apartment to Minnesota (C259;A5). Golly agreed to travel to Illinois to do so. (C259;A5). Because Golly had recently undergone knee replacement surgery, he enlisted the help of Eastman,

who worked as one of Golly's farm hands (C259-260;A5-6). On March 12, 2011, Golly, his son (Todd Golly) and Eastman drove to decedent's residence to help him pack his belongings to move to Minnesota (C260;A6).

Prior to this trip, Eastman and decedent had been only casual acquaintances, having met at the Golly farm on occasion when decedent was staying with the Golly family and *6 when Eastman was working at the farm. (C260;A6). By March, 2011, decedent was obviously weakened and depressed and it was clear that his health was failing and that he was dying (C260;A6). It was at this point that Eastman began to **exploit** decedent's vulnerability and undertook to secure a position of trust and confidence with decedent (C260;A6). Furthermore, Eastman pursued a course of conduct to undermine the friendship and trust that existed between decedent and Golly by, among other things, (1) making repeated false statements about Golly to decedent: (2) casting Golly in a disparaging light calculated to undermine Golly's character and trustworthiness in decedent's eyes; (3) seeking to portray Golly as greedy; and (4) making Golly appear to be an unworthy recipient of decedent's estate. (C260;A6). Conversely, Eastman portrayed himself and his family as victims of Golly's alleged greed and as **financially exploited** by Golly. (C260;A6).

All of Eastman's actions were calculated to cause decedent to resent Golly, to insinuate Eastman into a position of trust with decedent, to create an estrangement and loss of trust between decedent and Golly, and, ultimately, to cause decedent to change his estate plan to the benefit of Eastman and to the detriment of Golly (C260;A6).

Eastman's Campaign to Influence Decedent and Interfere with Golly's Expectancy

One part of Eastman's effort to influence decedent to change his estate plan was to **exploit** decedent's vulnerability and paranoia to insinuate himself into a position of trust with decedent.(C261;A7). Eastman did this by criticizing Golly, questioning Golly's good faith and trustworthiness, and challenging Golly's worthiness to be a recipient of decedent's estate.(C261;A7). Another part of Eastman's effort to influence decedent was to **exploit** decedent's vulnerability and sympathies by portraying himself as in need of money, and to *7 allege that Golly was partially responsible for Eastman's lack of money. (C261;A7). Eastman told decedent that Golly did not need money because he was already successful but that Eastman did need it, and that Golly was refusing to pay Eastman (C261;A7). Eastman's repeated statements to decedent that Golly failed to pay him for work he performed were knowingly false, as Golly paid Eastman in full for all work Eastman reported performing for Golly (C261;A7).

Eastman's statements to the decedent were intended to cast Golly in a false light and undermine the confidence decedent placed in Golly by wrongly characterizing Golly as unjust and **exploitive** of Eastman, and thus not a worthy recipient of decedent's estate. (C261;A7). Eastman's statements were intended to cause decedent to become angry at Golly and remove him from his will and to insert Eastman as the beneficiary of decedent's will (C261-262;A7-8).

Decedents weakened physical, emotional and mental condition rendered him increasingly unable to resist Eastman's influence over him and to discern the falsity of Eastman's statements regarding Golly to him (C267;A13). At this time, decedent was suffering the affects of multiple **strokes**, the end stages of **leukemia**, was taking numerous medications, displayed an increasingly morbid outlook and was expecting to die very soon, and was increasingly paranoid and suspicious. (C267;A13). Eastman knew of decedent's paranoia and susceptibility to believe the worst about others and, knew, therefore, that repeating to decedent the false statements about Golly would serve to undermine decedent's trust in Golly and cause Golly to appear untrustworthy (C262;A8).

***8 Alberto Rosillo's Observations of Eastman's Campaign to Influence Decedent**

During this time, Eastman made inquiries about how to "change" the will of someone who already had a will, including making such inquiries of a local scrap collector, Alberto Rosillo (C261;A7). Eastman said that the person whose will he planned to change was not in good shape and was dying from **leukemia**. (C261;A7). Eastman said that in order to get the person to change his will, he told the person that he (Eastman) needed the money for his family and that his boss (Golly) was not paying him for his work, which was creating a hardship for his family (C261;A7). Eastman also told Rosillo that he believed that the person was not very competent and that he did not have much time to live. (C261;A7). On March 26, 2011, decedent came to

Minnesota. (C262;A8). At that time, he was complaining of a severe headache and pain in his eyes, he couldn't talk properly, his eyes appeared bloody, and he was visibly very weak and physically and mentally diminished. (C262;A8). Decedent's physical condition continued to decline that weekend and he grew increasingly paranoid and easily upset (C262;A8).

That same day, Eastman went to decedent's Blue Earth home in order to prevail upon him to revoke his existing will and to prepare a new will that included Eastman as the beneficiary of decedent's estate (C262;A8). At that time, Eastman again repeated the false and disparaging statements about Golly to decedent in an effort to anger decedent and cause him to turn against Golly and to remove him from his estate plan (C262;A8).

Around this time, Rosillo asked Eastman how he was able to get decedent to change his will (C263;A9). Eastman stated that he was doing so by making these statements about Golly to decedent. (C263;A9). Eastman also asked Rosillo at this time if he (Eastman) could go to jail for pressuring someone to change their will (C263;A9).

***9** Also, at about this time, Eastman told Rosillo, that he (Rosillo) could take down a windmill on some property for scrap metal and parts and also haul away scrap iron from the property (C263;A9). Eastman told Rosillo that the property, which belonged to decedent at the time, was going to be Eastman's after decedent died. (C263;A9).

Shortly after Rosillo arrived at the property, Eastman arrived there with decedent as a passenger in his truck. (C263;A9). Decedent looked pale and weak and fell to the ground as he got out of the truck. After decedent got out of the truck, he inquired as to why Rosillo was present at the property and told him to get off his property (C263;A9). Eastman indicated to Rosillo that he was not to tell decedent why he was at the property (C263;A9). Decedent asked Eastman if he trusted Rosillo and Eastman said he was his friend and that he trusted him (C263;A9). Eastman attempted to enlist Rosillo in lying to decedent by telling decedent that he (Rosillo) was not being paid by Golly, and Eastman asked Rosillo to tell decedent that Golly had not paid Eastman for work he had performed for Golly or at Golly's request (C263-264;A9-10). Rosillo declined to do so because he did not believe this was true (C264;A10). In Rosillo's presence, Eastman falsely told decedent that Golly did not pay him for work he performed on Golly's farm nor for knocking down a trailer. Eastman again repeated the false claims that Golly's failure to pay him created a hardship for his family, that he was not making it **financially** due to Golly's failure to pay him for his work and that he needed to be paid because he had a wife and a family to support. (C264;A10).

Eastman made these false statements to turn decedent against Golly and to get decedent to remove Golly from his (decedent's) will and to include Eastman in his will. (C264;A10). In response, decedent got visibly very angry at Golly for not paying Eastman ***10** and stated that he had trusted Golly to handle his affairs and that (in response to this information) he would "write-out" Golly. (C264;A10). Decedent stated that he was upset by the news that Golly did not pay Eastman and indicated that since Golly did not pay Eastman, he would take care of Eastman and make sure that he got his money (C264;A10).

The 2011 Will

As a result of Eastman's actions, shortly thereafter, on or about April 8, 2011, decedent signed a new will, the 2011 Will, which revoked his earlier will, completely disinherited Golly and inserted Eastman as the executor and sole beneficiary of his estate (C264;A10). Decedent did so because he believed the false statements told to him by Eastman about Golly which cast Golly in a false light, which were effective in turning decedent against Golly and in favor of Eastman, and which operated on decedent to unduly influence and control him to change his estate plan, through the 2011 Will, to disinherit Golly and to substitute Eastman as beneficiary (C264-265;A10-11). After decedent's death, Eastman was heard stating that he had been able to prevail upon the decedent to change his will and to leave his estate to him (C266;A12).

Eastman's Fiduciary Relationship With The Decedent and his Breach of his Fiduciary Responsibilities

Eastman's (1) false statements disparaging Golly to decedent, which undermined decedent's relationship with Golly; (2) false statements about his family's **financial** need and **exploitation** by Golly, intended to manipulate decedent's sympathies; (3)

assistance to decedent at his home; and (4) insinuation of himself into the position of trust previously occupied by Golly; all were calculated to interpose Eastman into decedent's will and to cause Golly to be removed from the will. (C265;A11). By the foregoing course of conduct, *11 in March and up to April 8, 2011, Eastman successfully prevailed upon decedent to shift his trust and confidence from Golly and to place it in Eastman, thereby creating a fiduciary relationship and imposing on Eastman the duties of a fiduciary (C265;A11). Eastman thus stood in a fiduciary and confidential relationship with decedent as a result of these successful efforts to prey upon decedent's vulnerable physical, emotional and mental condition and to insinuate himself into a position of trust and confidence with the decedent (C266-267;A12-13). Decedent would not have changed his estate plan, or create the 2011 Will as he did, had he not been acting under these false beliefs created by Eastman's undue influence (C265;A11).

At the time the 2011 Will was executed, decedent was acting under the undue and wrongful influence of Eastman because he believed the false information told to him by Eastman (C264;A10). The 2011 Will was not the reflection of decedent's free intent and instead was the result of the wrongful influence and false statements of Eastman, who stood in the position of a fiduciary to decedent.(C265;A1 1). Eastman's repeated false statements, made in the context of Eastman's fiduciary relationship to decedent, and decedent's belief in such statements, acted as an undue influence and controlling force upon decedent at the time decedent execute the 2011 Will. (C265;A11). The 2011 Will does not reflect decedent's independent intentions but, rather, the intentions of Eastman (C267;A13).

Eastman's conduct constitutes a violation of his confidential and fiduciary relationship with decedent and breached his confidential and fiduciary obligations owed to decedent.(C270;A16). Eastman undertook this conduct for his own personal gain and to defeat Golly's testamentary expectancy (C270;A16).

***12 Eastman's Influence Undermined Decedent's Relationship With Golly And Interfered With Golly's Expectancy**

Decedent did not change and, had no intention of changing his estate plan prior to Eastman's visit to decedent in March 2011, or before Eastman's campaign to bring about a change in decedent's will. (C265;A11). Prior to the false statements by Eastman to decedent about Golly, Decedent never expressed any anger with Golly that could explain his complete disinheritance of him (C265;A11). Indeed, he continued to contact Golly whenever he needed help or when he had health problems (C265;A11). Immediately after Eastman's March 2011 visit, however, it appeared that decedent had changed and that he did not trust Golly to handle his **financial** affairs as he had previously. (C265;A11). For example, the decedent could not let Golly pay decedent's LP gas bill from decedent's funds as he had done previously. (C265;A11). Decedent never informed Golly that he was changing his estate plan to eliminate Golly's inheritance (C265;A11). At no time prior to Eastman's false statements and efforts to undo decedent's estate plan was there any disruption in the friendship between decedent and Golly and at no time did decedent ever indicate to Golly any displeasure with him or his family (C265-266;A11-12). Golly continued to be the most natural and obvious object of decedent's affection throughout this time (C266;A12).

As a natural object of decedent's bounty, Golly had an expectancy that he would receive decedent's estate pursuant to the valid 2010 Will of Richard DiMatteo (C269;A15). Decedent had expressly explained to Golly that this was his intent, an intent decedent never disavowed or modified except as reflected in the 2011 Will and in the statements of decedent in response to Eastman's false statements with respect to Golly (C269;A15).

*13 The 2011 Will completely denies Golly any bequest and, instead, inserts Eastman as the sole beneficiary of decedent's estate, thus providing Eastman with 100% of an estate of which he would not have received any portion apart from exerting influence on decedent (C269;A15).

Eastman knew that decedent was vulnerable to the influence that he directed and exercised upon decedent (C269;A15). Eastman used his position of trust and, at the same time, sought to and did undermine the longstanding friendship and trust that had existed between decedent and Golly (C269;A15). Eastman's exercise of influence upon decedent was to the detriment of Golly, thereby interfering with Golly's testamentary expectancy (C269-270;A15-16). Eastman's false statements and conduct operated

on decedent at the time he executed the 2011 Will and caused decedent to disinherit Golly and to include Eastman in the will (C270;A16).

Eastman intentionally interfered with Golly's testamentary expectancy through, among other means, exercising influence over decedent, abusing a confidential relationship with decedent, breaching his fiduciary obligations to decedent, and exercising undue influence over decedent that the 2011 Will was not the free act of decedent but instead constituted Eastman's substitution of his own interest and intentions in the place of decedent's intentions. (C270;A16). Eastman undertook these actions at a time when decedent was unable to resist such influence. (C270;A16). Eastman's influence was all to the benefit of Eastman and all to the detriment of Golly (C270;A16). If not for Eastman's actions, Golly would have realized his testamentary expectation of receiving the share designated for him in the valid 2010 Will (C270;A16).

***14** As a result of Eastman's conduct, Golly has been damaged, as Golly has not received the portion of the estate that he would have received but for Eastman's interference. (C270;A16).

STANDARD OF REVIEW

On appeal of an order granting a motion to dismiss, the appellate court takes as true all well-pleaded facts in the complaint and all reasonable inferences that may be drawn therefrom. *Meerbrey v. Marshall Field & Co.*, 139 Ill.2d 455 (1990). A motion to dismiss for failure to state a claim attacks the legal sufficiency of the complaint and on review of the dismissal the appellate court must determine whether the allegations of the complaint, when taken in the light most favorable to the plaintiff, sufficiently set forth a cause of action on which relief may be granted. *DOD Technologies v. Mesrow Ins. Services, Inc.*, 381 Ill.App.3d 1042, 1045-46 (1st Dist. 2008). Whether a complaint should be dismissed on the pleadings presents a question of law, which is reviewed de novo. *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 227 Ill.2d 381 (2008).

ARGUMENT

I. INTRODUCTION

Contrary to well-settled principles of Illinois law, the trial court here erroneously dismissed both counts of Thomas Golly's Amended Petition with prejudice, notwithstanding the Amended Petition's specific allegations of Clint Eastman's undue influence (Count I) and Eastman's tortious influence with Golly's testamentary expectancy (Count II). Under well-established Illinois precedent the trial court was bound to construe in Golly's favor all of his allegations and any reasonable inferences drawn therefrom. Here, however, the trial court failed to do so and, instead, held Golly to a higher and different standard than is to be ***15** followed at the motion to dismiss stage. The trial court's dismissal with prejudice of the Amended Petition was error, because - as is explained below -the Amended Petition states causes of action for undue influence and tortious interference with expectancy.

II. THE ALLEGATIONS IN THE VERIFIED AMENDED PETITION ARE SUFFICIENT TO EASILY OVERCOME A MOTION TO DISMISS UNDER ILLINOIS LAW; ACCORDINGLY, THE TRIAL COURT ERRED IN GRANTING EASTMAN'S MOTION TO DISMISS.

A. The Allegations in the Amended Petition are Specific.

The Amended Petition includes extensive, factually-specific allegations setting out Eastman's repeated false statements to the decedent and Eastman's tortious conduct. The Amended Petition also explains that Eastman stood as a fiduciary to the decedent (R. C265; A1 1) and that Eastman's statements and conduct, in the specific context of the fiduciary relationship, together unduly influenced the decedent to disinherit Golly and execute a new will naming Eastman as his sole beneficiary. (R. C266-68; A12-14). The Amended Petition further alleges that Eastman's influence operated in this way on the decedent at a particularly vulnerable time for the decedent, when he was in failing health, just two months before he died. (R.C265;A11).

The factually specific “Allegations Common to All Counts” section of the Amended Petition consists of 24 paragraphs spanning 101/2 pages. (R. C256-266; A2-12). In addition, both Count I (Undue Influence) and Count II (Tortious Interference with Testamentary Expectancy) include *additional* allegations of fact specific to those counts. (R. C266-271; A12-17). These allegations and the inferences therefrom - which *must be drawn in favor of Golly* in the context of a motion to dismiss - were more than sufficient to withstand a §2-615 motion to dismiss. *DeHart v. DeHart*, 2012 IL App (3d), 736910, ¶42.

***16** The allegations in the Amended Petition set forth Eastman's conduct, what Eastman said, when and where he said it, to whom and in whose presence Eastman's statements were made, and how Eastman's statements operated on decedent to influence him to disinherit Golly. Significantly, the allegations present that Eastman planned and carried out a deliberate and ultimately successful campaign to establish himself into a position of trust with the decedent, in order to exert his influence over decedent. (R. C260-68; A6-14). The Amended Petition alleges that Eastman's campaign involved, among other things, inquiring about how to “change” a person's will (R. C261; A7), making false statements to the decedent (R. C261-62; A7-8) and subjecting the decedent to conduct calculated to influence him to “change” his will (R. C263; A9), and, after the decedent had executed the new 2011 Will, bragging that he had been successful in getting decedent's will “changed.” (R. C266; A12).

The Amended Petition alleges that Eastman's false statements to the decedent included statements attacking Golly's character, including statements to the effect that Golly was not paying Eastman for his work for Golly. (R. C264; A10). The Amended Petition further alleges that Eastman's statements were calculated (1) to turn decedent against Petitioner (R. C267; A13); (2) to establish Eastman in a position of trust and confidence with decedent (R. C266-67; A12-13); (3) to give decedent false reasons to provide for Eastman (R. C264); and (4) to give decedent false reasons to view Golly as greedy and undeserving of decedent's bounty. (R. C264; A10). The Amended Petition also alleges that in response to Eastman's lies and derogation of Golly's character, the decedent declared he would “write-out” Golly from his will and provide for Eastman. (R. C264; A0). The Amended Petition also alleges that very soon after the time of this statement, the decedent did in fact ***17** execute the 2011 will, eliminating Golly from his estate plan and leaving his entire estate to Eastman. (R. C264; A10). Finally, the Amended Petition alleges that after decedent died, Eastman was heard bragging about having orchestrated the “change” in the will. (R. C266; A12). The Amended Petition thus contains detailed, fact-specific allegations and does not rest on “mere conclusions.”

B. The Allegations in the Amended Petition Must be Drawn in Favor of Golly.

Under well-settled Illinois law, a court considering a §2-615 motion to dismiss must take all well-pleaded facts as true and must draw *all inferences* therefrom in favor of the non-movant. *Meerbrey v. Marshall Field & Co.*, 139 Ill.2d 455 (1990). No claim should be dismissed pursuant to §2-615 unless it clearly appears that no set of facts can be proved which would entitle the plaintiff to recover. *Id.* Moreover, as the Appellate Court has emphasized, the “*facts establishing undue influence may be wholly inferential* and that “[f]alse or misleading representations concerning the character of another may be so connected with the execution of the will that the allegation that such representations were made to the testator may present triable fact questions on the issue of undue influence.” *DeHart*, 2012 IL App (3d), 736910, ¶25 (italics added), quoting *In re Estate of Hoover*, 155 Ill.2d 402, 412 (1993). Here, the Amended Petition sets forth specific allegations of fact outlining Eastman's undue influence and tortious interference with testamentary expectancy and, thus, easily meets the standard to overcome a §2-615 motion to dismiss.

The proper function of a motion to dismiss is not to *challenge* the merits of allegations, or the credibility of witnesses, but instead to question whether necessary ***18** allegations have been made. *See, e.g., DeHart* at ¶27. Factual disputes and credibility assessments are improper in the context of a motion to dismiss. *See, e.g., id.* at ¶24.

Nonetheless, Eastman's Motion to Dismiss went beyond the bounds of a proper motion to dismiss and attacked the credibility of the allegations in the Amended Petition, and in particular the allegations of a fiduciary relationship between Eastman and the decedent. For example, the Motion to Dismiss contended that “Golly is alleging that Decedent, a paranoid, would trust and believe someone who was a casual acquaintance 14 days earlier... And of course was are to believe all this...” (R. C412; A35).

Such attacks are wholly inappropriate at the pleading stage, where the trial court was bound to construe all allegations in the Amended Petition as true and in the light most favorable to Golly. *See DeHart*, ¶42. Additionally, the Motion to Dismiss also improperly reached beyond the allegations in the Amended Petition by attempting to impeach the credibility of Alberto Rosillo, to whom and in whose presence Eastman made false statements. (R. C263-64; A9-10). Significantly, Rosillo also witnessed decedent's reaction to Eastman's false statements: decedent indicated that he would "write-out" Golly from his will, and instead provide for Eastman. (R. C264; A10). The Motion to Dismiss improperly attacked Rosillo's credibility, belittling and deriding him as a "trespasser" (R. C412; A35) and "scrap dealer." (R. C410; A33).

These challenges to Golly's allegations and evidence set forth in the Amended Petition were improper in a motion to dismiss and should have been stricken or, at a minimum, ignored by the trial court. Inasmuch as the trial court found a fiduciary relationship was missing - where the Amended Petition contains numerous allegations asserting and supporting the existence of such a relationship - these improper attacks *19 highlight the error of the trial court's ruling. To the extent the probate court credited, considered, or relied on these improper arguments, its dismissal of the Amended Petition with prejudice should be reversed.

Here, the trial court did not issue a written opinion explaining its reasons for dismissing the Amended Petition with prejudice. (R. C509). However, it is clear from the dismissal that the trial court failed to draw the inferences in favor of Golly, and instead appears to have indulged inferences in *Eastman's favor*. As such, the trial court turned on its head the standard that should have governed its ruling. This, without more, requires the reversal of the trial court's dismissal of the Amended Petition.

III. THE ALLEGATIONS IN THE VERIFIED AMENDED PETITION STATE A CAUSE OF ACTION FOR UNDUE INFLUENCE UNDER WELL-ESTABLISHED ILLINOIS PRECEDENT.

The allegations in the Amended Petition state a cause of action for undue influence. In Illinois, the prima facie elements of an action for undue influence are: (1) a fiduciary relationship between the testator and a substantial and comparatively disproportionate beneficiary under the will; (2) a testator in a dependent situation in which the substantial and disproportionate beneficiary is in a dominant role; (3) a testator who reposed trust and confidence in the beneficiary; and (4) a will prepared or procured and executed in circumstances wherein the beneficiary was instrumental or participated. [Estate of Julian](#), 227 Ill.App.3d 369, 376 (1st Dist. 1992). The Amended Petition sufficiently alleged these elements so as to require the trial court's denial of the Motion to Dismiss under Illinois law.

However, it may not be necessary for Golly to meet every one of these elements in order to proceed with an undue influence case. For example, even absent a fiduciary relationship, where a person procures the execution of a will largely benefitting himself, *20 instead of others having an equal claim on the bounty of a testator enfeebled by age and disease, a presumption of undue influence arises. *Swenson v. Wintercorn*, 92Ill.App.2d 88, 98 (2nd Dist. 1968). *See also Smith v. Henline*, 174 Ill. 184, 198 (1898) (undue influence probable where testamentary instrument departs from previous testamentary disposition, was made under false impressions, was made under active influence of beneficiary who procured it, omits those with at least equal claims, and where testator was beset by old age, feebleness, and disease); and *see Cheney v. Goldy*, 225 Ill. 394, 400 (1907) (undue influence probable where will procured by active agency of beneficiary, those with equal claims absent from will, and testator beset by old age, enfeeblement, and disease).

Here, the Amended Petition alleges that Eastman procured the 2011 Will and that decedent was significantly enfeebled by disease, and indeed, was dying from end stage [leukemia](#), as well as suffering from psychological vulnerability. (R. C259; A5, C262; A8). Furthermore, the Amended Petition here alleges that Golly, who had cared for and has been a friend of the decedent for years, had a much better (not merely "equal") claim on decedent's bounty than Eastman, who had been decedent's casual acquaintance at best. (R. C257-60; A3-6). Thus the Amended Petition states a cause of action for undue influence, and would do so even if it didn't allege the existence of a fiduciary relationship, which, as explained below, it does allege.

A. Allegations in the Amended Petition Sufficiently Plead Each of the Elements of Undue Influence.

1. The Amended Petition Alleges a Fiduciary Relationship Between Eastman and the Decedent.

A fiduciary relation may exist as a matter of law between attorney-client, guardian-ward, trustee-beneficiary, and the like, or it may be the result of a more informal *21 relationship - moral, social, domestic or even personal in its origin. *Swenson*, 92 Ill.App.2d at 97. A fiduciary relationship exists where there is a special confidence reposed in one, who by reason of such confidence, must act in good conscience and good faith and with due regard to the interests of the person reposing such confidence. *Id.*

The Amended Petition alleges the existence of a fiduciary relationship between Eastman and the decedent which arose due to, among other things, the relative strength of Eastman compared to the frailty, poor health and paranoid mental state of decedent. (R. C261-68; A7-14).

The Amended Petition alleges that decedent was in ill health, was dying, had suffered strokes, was paranoid and was in the end stages of *leukemia*. (R. C257-59; A3-5, R. C262; A8). The Amended Petition also sets forth allegations of fact demonstrating that Eastman enjoyed a position of relative physical, psychological, and emotional strength vis-a-vis the decedent. (R. C261-68; A7-14). For example, the Amended Petition alleges, among other things, that (1) decedent was too weak to move himself from Illinois to Minnesota; (2) Eastman helped the Gollys in moving decedent; (3) decedent was in an emotionally weak, *paranoid state*; and (4) Eastman was cunning and carrying out a scheme to effect a change in decedent's estate plan. (R. C259-268; A5-14).

In addition to numerous allegations demonstrating features of a fiduciary relationship due to the relative strength of Eastman and the relative weakness of decedent, the Amended Petition also sets forth factual allegations showing how Eastman undertook to (1) foster this fiduciary relationship by *exploiting* decedent's vulnerable condition through deception; and (2) actively undermine and interfere in the longstanding relationship between Golly and decedent by, among other acts, impugning Golly's character. For example, the Amended *22 Petition alleges that Eastman knew of decedent's weakness (indeed, Eastman said he "thought he was not very competent") and used deception to *exploit* decedent and to overcome decedent's will:

Eastman said that the person whose will he planned to change (decedent) was not in good shape and was dying from *leukemia*. Eastman said that in order to get the person to change his will, he told him that he (Eastman) needed the money for his family and that his boss (Petitioner) was not paying him for his work, which was creating a hardship for his family. Eastman also stated that he believed that the person was not very competent and that he did not have much time to live. (R. C261; A7).

The allegations in the Amended Petition describe in detail Eastman's scheme to destroy decedent's trust of Golly and fraudulently procure decedent's trust himself. For example, the Amended Petition alleges that:

By March 2011, decedent was obviously weakened and depressed and it was clear that his health was failing and that he was dying. *Eastman then began to exploit decedent's vulnerability and undertook to secure a position of trust and confidence with decedent. Eastman pursued a course of conduct to undermine the friendship and trust that existed between decedent and Petitioner, to make false statements about Petitioner to decedent, to cast Petitioner in a disparaging light and to make Petitioner appear to be an unworthy recipient of decedent's estate, and at the same time to portray himself and his family as victims of Petitioner's greed and exploitive conduct and to insinuate himself into a position of trust with decedent, all with a goal to use his (Eastman's) position of trust to create an estrangement and loss of trust between decedent and Petitioner, and to influence decedent to include Eastman in his will (R. C260) (italics added). (See also R. C261; A7).*

In the trial court below, Eastman claimed that the Amended Petition contained no allegations explaining why decedent, “upon hearing the allegations of his casual acquaintance [Eastman] would no longer want to leave everything to his old friend [Golly].” (R. C412; A35). This ignores the allegations of the Amended Petition which clearly allege a fiduciary relationship between Eastman and decedent, and thus provide the reason Eastman *23 claimed to be seeking. (R. C265-68; A11-14). The Amended Petition further alleges that the 2011 Will disinheriting Golly and including Eastman as sole beneficiary of the estate arose directly from and was due to Eastman's fiduciary relationship to decedent. (R. C267; A13). Furthermore, the Amended Petition alleges that it was “decedent's paranoia and susceptibility to believe the worst about others” that made Eastman's ploy so effective. (R. C267;A13).

Inasmuch as the Amended Petition alleges that decedent believed and trusted Eastman regarding Golly and included Eastman in his will, it must be inferred that Eastman was standing as a fiduciary with respect to decedent and thus was precluded from using this relationship to his own advantage. (R. C264-65; A10-11, R. C267; A13). Further, the Amended Petition sets forth Eastman's actual statements, which describe how he insinuated himself into a position of trust with the decedent and successfully supplanted Golly in that position:

At or about [March 26,2011], Rosillo asked Eastman how he was able to get decedent to change his will. Eastman stated that he was doing so by telling decedent that Petitioner was not paying him for the work he was performing and that Petitioner refused to pay him when Eastman asked to be paid and that Eastman's family was suffering hardship as a result and that he (Eastman) needed the money and Petitioner did not need it. (R. C263; A9).

The Amended Petition further alleges that:

Eastman also asked Rosillo at this time if he (Eastman) could go to jail for pressuring someone to change their will. (R. C263; A9).

Eastman's inquiry here -- regarding possible jail time for his scheme to “change” decedent's will - gives rise to the inference that Eastman *knew* his actions were improper. Later, as alleged in the Amended Petition, “[a]fter decedent's death, Eastman was heard *24 stating that he had been able to prevail upon decedent to change his will to leave his estate to him.” (R. C266; A12).

Again, at this same time, Eastman repeated the false statements about Golly, and attempted to enlist Rosillo to support him in doing so, to further secure his position of confidence with decedent and to undermine the relationship between Golly and the decedent, all in an effort to receive decedent's estate:

Shortly after Rosillo arrived at the property, Eastman arrived there with decedent as a passenger in his truck and, at that time, decedent looked pale and weak and fell to the ground as he got out of the truck... Eastman told Rosillo not to tell decedent why he was at the property. Decedent asked Eastman if he trusted Rosillo and Eastman said he was his friend and that he trusted him. Eastman attempted to enlist Rosillo in lying to decedent about not being paid, and asked Rosillo to tell decedent that Petitioner had not paid Eastman for work Eastman had performed for Petitioner or at Petitioner's request. Rosillo declined to do so because he did not believe this was true. In Rosillo's presence, Eastman told decedent that Petitioner did not pay him for work he performed on Petitioner's farm nor for knocking down a trailer. Eastman repeated the false claim that Petitioner's failure to pay him created a hardship for his family, that he was not making it **financially** due to Petitioner's failure to pay him for his work and that he needed to be paid because he had a wife and a family to support. In response, decedent got visibly very angry at Petitioner for not paying Eastman and stated that he had trusted Petitioner to handle his affairs and that (in response to this information) he would “write-out” Petitioner. Decedent stated that he was upset by the news that Petitioner did not pay Eastman and indicated that since Petitioner did not pay Eastman, he would take care of Eastman and make sure that he got his money. On information and belief, Eastman made these false statements in order to

turn decedent against Petitioner and to get decedent to remove Petitioner from his (decedent's) will and to include Eastman in his will. (R. C264; A10).

Finally, the Amended Petition alleges that on April 8, 2011, as a result of Eastman's actions and the trust and confidence decedent now reposed in Eastman because of those actions, decedent signed a new will, revoked his earlier will, completely disinherited his *25 close friend Golly and inserted Eastman as the executor and sole beneficiary of his estate. (R. C264; A10).

Grounded on these allegations of fact -- which under Illinois law must be accepted as true when considering a motion to dismiss -- the Amended Petition alleges the existence of a fiduciary and confidential relationship between Eastman and the decedent, which Eastman secured "as a result of Eastman's successful efforts to prey upon decedent's vulnerable physical, emotional and mental condition." (R. C266-67; A2-13). The Amended Petition also alleges that "as a result of the trusting and fiduciary relationship between decedent and Eastman that Eastman orchestrated, Eastman had the opportunity to exercise and did, in fact, exercise influence over decedent's execution of the 2011 Will." (R. C267; A13).

Accordingly, the Amended Petition does in fact allege the existence of a fiduciary relationship, as it alleges (1) facts, including Eastman's conduct, and the decedent's weakness and vulnerability, that gave rise to the fiduciary relationship; and (2) that the decedent reposed trust and confidence in Eastman.

2. The Amended Petition Alleges that Eastman took a Dominant Role over the Decedent, who was in a Dependent Situation.

Where a testator's mind is wearied and debilitated by long-continued and serious and painful sickness, it is susceptible to undue influence, and is liable to be imposed upon by fraud and misrepresentation. *Cheney*, 225 Ill. at 400 (quoting *England v. Fawbush*, 204 Ill. 384 (1903)). The Amended Petition contains allegations that decedent was in a sick and dependent state, inasmuch as it alleges that he had suffered multiple strokes in the last year of his life (R. C259; A5) had leukemia at the same time (R. C259; A5), and was visibly weak *26 and diminished when he came to Minnesota, including having difficulty seeing and standing and suffering from headaches. (R. C262; A8). The Amended Petition also contains allegations of Eastman's misrepresentations to decedent (C263-65; A9-11) which were part of his scheme to achieve dominance over him (R. C263-65; A9-11). The Amended Petition thus clearly alleges this element of the cause of action.

3. The Amended Petition Alleges that the Decedent Reposed Trust and Confidence in Eastman.

The Amended Petition alleges several times that the decedent trusted Eastman and describes the specific conduct of Eastman that led to the decedent's misplaced trust, and alleges the acts supporting this and how the trust occurred. *See, e.g.*, (R. C265; All ("Eastman successfully prevailed upon decedent to place decedent's trust and confidence in Eastman"); (R. C266-67; A2-13) ("Eastman stood in a fiduciary and confidential relationship with decedent...a position of trust and confidence"); (R. C267; A13) ("trusting and fiduciary relationship between decedent and Eastman that Eastman had orchestrated"); (R. C268; A14) ("trust and confidence decedent placed in Eastman that Eastman had manufactured"); (R. C269; A15) ("Eastman used his position of trust"); and (R. C270; A16) ("abusing a confidential relationship with him").

4. The Amended Petition Alleges that Eastman Participated in the Procurement and Execution of the Decedent's 2011 Will.

As explained below, the *Hoover* and *DeHart* cases establish that allegations of misrepresentations and character attacks are sufficient to establish that the decedent's free will was overcome at the time a will was executed, and that it is well-settled that this is a factor for establishing a cause of action for undue influence. As *Hoover* and *DeHart* make clear, allegations that misrepresentations and attacks were made close in time to the *27 execution of a new will are sufficient to establish that the

misrepresentations and attacks operated upon the decedent at the time the new will was executed and meet this requirement that the will was procured or executed in circumstances wherein the beneficiary was instrumental. *See DeHart*, at 11¶¶25-29; *Hoover*, 155 Ill.2d 402, 412-415.

The allegations in the Amended Petition allege that Eastman employed these very methods to achieve the dual result of undermining the relationship between decedent and Golly and allowing decedent to supplant him as the trusted and trustworthy friend. Indeed, the Amended Petition's allegations concerning Eastman's own statements -- without more -- were sufficient to require the denial of the Motion to Dismiss. The Amended Petition alleges that during the time that Eastman was carrying out his campaign to influence decedent, Eastman asked Rosillo about how to "change" the will of a person who already had a will. (R. C261; A7). Eastman also told Rosillo that he was able to get decedent to change his will by telling him falsely (1) that Golly was not paying him; (2) that his (Eastman's) family was suffering hardship as a result, and (3) that Golly did not need the money. (R. C263; A9). In addition, after Eastman had successfully orchestrated the overthrowing of the decedent's earlier will and the execution of the 2011 Will that left decedent's entire estate to him, Eastman was heard bragging that he had been able to prevail upon decedent to leave him his estate. (R. C266; A12).

B. The Amended Petition's Allegations Regarding Eastman's Misrepresentations and Attacks on Golly's Character State a Cause of Action for Undue Influence.

It is well settled in Illinois that the Amended Petition's allegations of Eastman's misrepresentations and disparaging statements made to a decedent who later changes his will in favor of the one who made the statements are sufficient to state a cause of action of undue *28 influence. As a threshold matter, as the Illinois Supreme Court held in *Hoover*, and as followed by the Appellate Court in *DeHart*, "facts establishing undue influence may be wholly inferential." 155 Ill.2d at 412. Moreover, *False or misleading representations concerning the character of another may be so connected with the execution of the will that the allegations that such misrepresentations were made to the testator may present triable fact questions on the issue of undue influence.*

Id. at 412 (italics added). *See also Sterling v. Kramer*, 15 Ill.App.2d 230, 236-37 (1st Dist. 1957) (allegations that sole beneficiary made false representations about plaintiff to testator sufficiently stated cause of action for undue influence and required reversal of trial court order striking allegations). Illinois courts recognize that "the substitution of one's will over that of the testator's original intent may be accomplished by misrepresentation and/or concealment of facts...Plaintiffs may introduce circumstantial evidence to demonstrate that the influence was connected with and operative at the time of execution of the will and that the influence was directed towards procuring the will in favor of the beneficiary." *DeHart*, 155 Ill.2d at 414. This is exactly what the allegations in the Amended Petition do. *See also Cheney*, 225 Ill. at 400 ("proof of undue influence may be wholly circumstantial and inferential."). Inasmuch as this type of circumstantial evidence is sufficient to establish a cause of action, such allegations are necessarily sufficient to state a cause of action. The trial court thus deviated from these well-established principles of law in dismissing the Amended Petition.

Like this case, *DeHart* involved the review of a trial court's grant of a motion to dismiss and dismissal of a challenge to a will alleging undue influence. In *DeHart*, the Appellate Court relied on *Hoover* in reversing the grant of a motion to dismiss. *DeHart*, at *29 25-29. Of particular relevance here, the *DeHart* court noted that a §2-615 motion to dismiss is a challenge only to the legal sufficiency of the complaint. *DeHart*, at ¶27. Accordingly, Eastman's attacks on the credibility of the allegations or evidence in the Amended Petition here were improper.

In reversing the §2-615 dismissal, the *DeHart* court noted that the complaint for undue influence alleged that the defendant made several misrepresentations to the decedent concerning the disinherited party's character, each of which was told to decedent shortly before the execution of the will. *DeHart*, at 126. Likewise, here, the Amended Petition includes such allegations of misrepresentations near the time of the new 2011 Will.

The *DeHart* Court agreed that such allegations were “sufficient to infer that ‘false and misleading representations and/or concealment of facts concerning his character were made’” which acted as an influence on the decedent at the time the will was executed in favor of defendant. *DeHart*, at ¶27.

The *DeHart* Court noted that the plaintiff had alleged that “the misrepresentations were made” and that “he once shared a close relationship” with the decedent. *Id.* In light of these allegations, the *DeHart* Court reversed the §2-615 dismissal and stated that “it must be left to the jury to resolve the numerous issues of material facts ***and to determine, ultimately, whether [the testator] was unduly influenced by the defendants to disinherit [the plaintiffs].” *Id.* at 128, quoting *Hoover*, 155 Ill.2d at 415. The same allegations are present here: the Amended Petition alleged that Golly shared a close relationship with decedent prior to Eastman's misrepresentations and attacks on Golly's character. (R. C257-59; A3-5, R. C265; A12).

*30 *Estate of Julian*, 227 Ill.App.3d 369 (1st Dist. 1992), relied on by Eastman in his motion to dismiss, provides no basis for granting the motion to dismiss. Julian involved “allegations of a testator's declining health, dominant influence exercised by a beneficiary and the threat by that beneficiary to expose that testator's sexual preference.” 227 Ill.App.3d at 376. However, significantly, and unlike here, the complaint in *Julian* failed to allege that the alleged influence actually overcame the testator's free will. *Id.* at 377.

Here, the Amended Petition not only clearly alleges that the decedent's free will was overcome (*See, e.g., R. C263; A9, R. C265-68; A1 1-14*), it also alleges in detail how it was overcome. Accordingly, the pleading deficiencies identified by the Julian court that allowed dismissal there are not present here. Moreover, as Hoover and DeHart make clear, allegations of misrepresentation and character attacks close in time to the new will are sufficient to establish that they operated upon the decedent at the time the new will was executed and meet the requirement that the will was procured or executed in circumstances wherein the beneficiary was instrumental. *See DeHart*, at ¶¶25-29; *Hoover*, 155 Ill.2d 402, 412-415.

Furthermore, the specificity with which facts must be alleged depends on the nature of the matter. “Where facts of necessity are within defendant's knowledge and not within plaintiff's knowledge, a complaint which is as complete as the nature of the case allows is sufficient.” *Yuretech v. Sole*, 259 Ill.App.3d 311,313 (4th Dist. 1994). Here, although Golly has alleged facts sufficient to overcome a motion to dismiss, many of the facts relating to Eastman's influence of decedent and procurement of the 2011 Will are within Eastman's knowledge and not within Golly's knowledge. Accordingly, the Amended Petition here is “as complete as the nature of the case allows” and, therefore, “is sufficient.” As explained *31 above, *Hoover* and *DeHart* hold that “facts establishing undue influence may be wholly inferential and that ‘[f]alse or misleading representations concerning the character of another may be so connected with the execution of the will that the allegation that such representations were made to the testator may present triable fact questions on the issue of undue influence.” *DeHart*, 125, quoting *Hoover*, 155 Ill.2d at 412. The Amended Petition alleges Eastman's misrepresentations and attacks on Golly's character, and alleges that such misrepresentations and attacks operated on the decedent at the time the new will was executed and deprived him of his free will. (R. C263-67).

The well-pleaded facts of the Amended Petition and all inferences that can be reasonably drawn from these facts, all of which must be taken as true in the context of a motion to dismiss, provide strong support for the additional allegations made on information and belief. Based on these facts, it is reasonable to infer that Eastman exercised undue influence to bring about the drastic change in decedent's will. *See DeHart*, at ¶¶25-29; *Hoover*, 155 Ill.2d 402,412-415.

The Amended Petition alleges that (1) in the final weeks before decedent's death, after decedent had suffered multiple strokes, at a time when he was in the end stages of dying from leukemia, was seriously ill and in a state of physical decline, was increasingly vulnerable and suffering from paranoia and in a weakened state, decedent's prior will was revoked and a new will was adopted leaving 100% of the decedent's estate to Eastman; (R. C259-64; A5-10) (2) at the time of these events, Eastman was inquiring about how to have a will “changed;” (R. C264; A10) (3) during this time, Eastman was making false statements to decedent and disparaging Golly's character, in an effort to undermine the relationship between decedent and Golly and to secure for himself the entire estate (R. C262-64; A8-10); *32 (4) Eastman was in a position of trust and confidence with decedent; and (5) after

the will including Eastman was executed, Eastman was heard bragging that he had been successful in getting decedent to change his will and to include Eastman in the will. (R. C266; A12). At the pleading stage, the facts alleged in the Amended Petition and the inferences that must be drawn therefrom in Golly's favor are sufficient to state a cause of action for undue influence and thus required the denial of the Motion to Dismiss. *DeHart v. DeHart*, 2012 IL App (3d), 736910, ¶42. These facts were more than sufficient to require the denial of the Motion to Dismiss in the trial court. Likewise, these facts now are more than sufficient to require this Court to reverse the trial court's dismissal of the Amended Petition, remand this case to the trial court, and order Eastman to answer the Amended Petition.

III. THE ALLEGATIONS IN THE AMENDED PETITION STATE A CAUSE OF ACTION FOR TORTIOUS INTERFERENCE WITH EXPECTANCY.

The elements of a cause of action for tortious interference with testamentary expectation are: (1) the existence of the expectancy; (2) the defendant's intentional interference with the expectancy; (3) that the interference involved conduct tortious in itself such as fraud, duress or undue influence; (4) that there is a reasonable certainty that the expectation would have been realized; and (5) damages. *Estate of Mocny*, 257 Ill.App.3d 291 (1st Dist. 1993). The Amended Petition sufficiently alleges each of these elements. Significantly, it is not necessary for a plaintiff to allege a fiduciary relationship to establish this cause of action.

A. The Amended Petition Alleges that Golly had a Testamentary Expectancy.

The Amended Petition alleges that decedent told Golly that he would include him in his will because of their long friendship and because of all that Golly had done for decedent. *33 (R. C258; A9). The Amended petition also alleges that decedent included Golly in his 2010 will. (R.C259;A5).

B. The Amended Petition Alleges that Eastman Intentionally Interfered with Golly's Expectancy.

As demonstrated above, the Amended Petition sets forth extensive allegations of fact detailing how Eastman intentionally interfered with Golly's testamentary expectancy. Eastman waged a campaign of lies, disparaging Golly and Golly's character, seeking to establish himself as a sympathetic victim of Golly's greed and wrongdoing, who was simultaneously asking around how to “change” another's will, whether such conduct could result in jail time, and then later bragging about how he had successfully orchestrated the change in the will. By asserting that he (Eastman), not Golly, needed decedent's money, Eastman also revealed that he knew that he was interfering with Golly's expectancy (or at a minimum, these allegations support such an inference).

C. The Amended Petition Alleges that Eastman's Interference Involved Tortious Conduct Including Lies, Character Attacks, and Undue Influence.

The Amended Petition includes several detailed allegations establishing that Eastman used tortious conduct (i.e., lies and character attacks) to interfere with Golly's expectancy. These allegations include:

- (1) that Eastman made inquiries about how to “change” the will of someone who already had a will (R. C262; A8);
- (2) that Eastman told Rosillo that he told decedent that he (Eastman) needed the money for his family and that Golly was not paying Eastman for his work, creating a hardship for Eastman's family (R. C264; A10);
- (3) that Eastman told Rosillo he said these things to decedent this to get decedent to “change” his will (R. C262; A8, R. C264; A10);

*34 (4) that Eastman intended the statements to cast Golly in a false light to the decedent, to undermine decedent's confidence in Golly, and to cause decedent to believe that Golly was not a worthy recipient of his estate (R. C262; A8, R. C266; A12);

(5) that Eastman undertook all this with the goal of causing decedent to become angry at Golly and remove him from decedent's will, and to instead insert Eastman as the beneficiary of his will (R. C260; A6);

(6) that in response to Eastman's false statements and disparagement of Golly's character, decedent got visibly very angry at Golly and stated that he had trusted Golly to handle his affairs and that he would "write-out" Golly and that he would take care of Eastman and make sure that he got his money (R. C264; A10);

(7) that shortly after the false statements made by Eastman to decedent, decedent signed a new will, completely disinheriting Golly and inserting Eastman as the executor and sole beneficiary of his estate (R. C264; A10); and

(8) that after decedent's death, Eastman said that he had been able to prevail upon the decedent to change his will and to leave his estate to him (R. C266; A12).

In the trial court, Eastman attacked Count II by falsely and inexplicably claiming that the Amended Petition failed to allege any tortious actions by Eastman (R. C418; A41) ("Lacking most notably from petitioner's complaint [sic] are allegations that the interference involved tortious conduct in itself."). Inconsistently, however, Eastman also acknowledged throughout his Motion to Dismiss in the trial court that the Amended Petition does allege that Eastman lied to decedent, and that the 2011 Will, which left everything to Eastman, resulted from such lies (e.g., "It alleges Eastman prevailed upon Decedent to make a new will in Eastman's favor by making false statements about Petitioner." (R. C408-09; A31-32)).

Clearly, the Amended Petition's allegations (1) that Eastman made false statements about Golly to decedent; (R. C261-64; A7-10) and (2) that Eastman wrongfully criticized Golly to decedent in an effort to undo the decedent's will and displace Golly (R. C264-66; *35 A10-12), are each allegations of tortious conduct by Eastman. See *DeHart*, at ¶¶25-29; *Hoover*, 155 Ill.2d 402, 412-415. The Amended Petition further alleges that Eastman engaged in conduct from which the inference arises that at the time that Eastman initiated his tortious efforts, he knew that he was not the decedent's intended beneficiary. The Amended Petition alleges that Eastman told the decedent, in his effort to influence him and to effect a change to the decedent's will, that Eastman and not Golly, "needs" decedent's money. (R. C262-63; A8-9). This allegation yields the unavoidable inference that Eastman knew that he was interfering with Golly's testamentary expectancy, because if he believed otherwise, he would not have told the decedent that Golly did not need the decedent's money. Under Illinois law, the trial court was bound to draw this inference in favor of Golly in deciding the Motion to Dismiss. See *Jespersen v. Minnesota Min. and Mfg. Co.*, 183 Ill.2d 290, 307(1998).

Finally, as also explained above, *Hoover* and *DeHart* demonstrate that misrepresentations and character attacks can establish a tortious interference claim. The Amended Petition clearly makes out a cause of action for tortious interference with expectancy. Therefore, the dismissal of Count II of the Amended Petition was in error and should be reversed.

D. The Amended Petition Alleges That There is a Reasonable Certainty that Golly's Expectation Would Have Been Realized.

The Amended Petition alleges that it was Eastman's false statements, character attacks and actions that caused decedent to change his will and, but for Eastman's actions, decedent's estate would have passed to Golly and not to Eastman. Among the allegations in the Amended Petition that state this element of the cause of action are those that allege *36 that the decedent became angry at Golly because of Eastman's misrepresentations and allege that the decedent vowed to "write-out" Golly from his will and, instead take care of Eastman. (R. C263-64; A9-10).

The Amended Petition further alleges (consistent with the facts of Hoover and DeHart) that Eastman's false statements and conduct operated on decedent at the time he executed the 2011 Will and caused decedent to disinherit Golly and to include Eastman in the will. (R. C263; A9). Moreover, the Amended Petition also alleges that the decedent did not change, and had no intention of changing, his estate plan prior to the wrongful actions of Eastman. (R. C265; All). In fact, the Amended Petition alleges that prior to the false statements and the derogation of Golly's character by Eastman, (1) decedent never expressed anger with Golly that could explain his complete disinheritance of him; (2) there was no disruption in the friendship between decedent and Golly; and (3) at no time did decedent ever indicate to Golly any displeasure with him or his family. (R. C265; All).

E. The Amended Petition Alleges that Golly was Damaged by Eastman's Interference With Golly's Expectancy.

Finally, the Amended Petition clearly makes out the element of damages - that Golly was damaged by Eastman's interference. The Amended Petition alleges, for example, that under decedent's 2010 Will, 100% of decedent's estate passed to Golly. (R. C258-59; A4-5). As a result of Eastman's tortious conduct, Golly has been damaged in that 100% of decedent's estate passed to Eastman and 0% of the estate went to Golly. See, e.g., (R. C264; A10).

The Amended Petition sets forth extensive allegations of fact that easily meet the settled standards for pleading a cause of action for tortious interference with testamentary *37 expectancy. In dismissing the Amended Petition in the face of such allegations, the trial court erred and the order of dismissal should be vacated.

CONCLUSION

For all the foregoing reasons, THOMAS GOLLY prays as follows:

(A) That the trial court's order granting Eastman's Motion to Dismiss with prejudice be vacated;

(B) That this cause be remanded to the trial court for further proceedings consistent with this Court's order;

(C) That Eastman be ordered to answer the Verified Amended Complaint; and

(D) For such other further relief as Golly is entitled to under law.